

**THE DEFENSE FUNCTION IN A CAPITAL CASE**  
**Supplement to Testimony of Harry J. Trainor, Jr.**  
**Before the Maryland Death Penalty Study Commission**  
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\_\_\_\_\_The lawyers I know in Maryland who are regularly involved in the defense of capital cases are a relatively small, but dedicated and well-qualified, group. Unlike other state capital defense systems cited in Ms. Fleischacker's written testimony, in Maryland's capital defense system I have not seen a capital legal defense team that is lacking in skill or experience or a team staffed by newly-admitted lawyers. Lack of qualified counsel is generally not the problem in Maryland, because we have an excellent Office of the Public Defender. The Capital Defense Unit of that office, although perhaps seriously underfunded, is run by a highly-qualified and experienced capital litigator who supervises approximately three other dedicated lawyers who keep the defense function in Maryland capital cases running. Defendants facing capital charges generally rely on the services of the public defender, and because these cases require so much legal work, the capital defense unit is often required to ask private defense counsel to represent capital defendants at trial. I have never heard that the Capital Defense Unit has paneled a Maryland capital case to anything but an experienced defense team. But, in order to take these appointments in Maryland state court cases, private defense counsel must agree to limit billing for attorney time to \$50.00 per hour, with a cap of \$20,000, although the Public Defender has the authority to approve, and often does approve, payments in excess of the \$20,000 cap. Virtually any private attorney accepting such a case does so at a great

financial sacrifice, since \$50.00 per hour is not sufficient in most cases to begin to cover the office overhead, much less the salary of the attorney<sup>1</sup>. Paneled capital cases not only cause private attorneys to lose money<sup>2</sup>, but the enormous commitment of time required for adequate representation of a capital defendant and the stress associated with the great responsibility that a trial team has accepted in protecting another human being from execution is quite literally — emotionally draining. For these reasons and others, many conscientious and qualified lawyers in private practice are at times unable to accept an appointment to a Maryland capital case.

The Supreme Court of the United States has told us in *Wiggins v. Smith*<sup>3</sup>, that when the Court is asked to decide whether defense counsel has met his or her obligation under the 6<sup>th</sup> Amendment to provide effective assistance of counsel in a capital case, the Court will look to the *A.B.A. Guidelines for Appointment and Performance of Counsel in Death*

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<sup>1</sup> In contrast to Maryland, in the federal system defense counsel in appointed capital cases are currently paid at \$170.00 per hour with no cap for all work in and out of court. According to the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 9.1(B)*: “Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.”

<sup>2</sup> In the last Maryland capital case I tried, *State of Maryland v. Kevin Johns*, a case that went to trial earlier this year, I invested almost 600 hours of my time, causing me to decide that I could not meet my obligations to my client and at the same time meet my financial obligations to my law partners. As a result I made the decision that during the trial I would remove myself from the firm’s payroll. During the trial and the weeks preceding the trial I was forced to devote 100% of my time to the *Johns* case, being thereby unable to accept new cases from clients paying normal legal fees. From a financial standpoint, virtually every private attorney accepting a capital appointment in Maryland will suffer.

<sup>3</sup> 539 U.S. 510, 123 S.Ct. 2527 (2003).

*Penalty Cases* as “**guides to determining what is reasonable.**” The clear message from the Supreme Court of the United States is that if Maryland attorneys in capital cases do not fully adhere to these standards we can expect that convictions and/or sentences in death penalty cases will ultimately be reversed and sent back for retrial and re-sentencing.

Defending a capital case is highly specialized legal work, requiring a team of lawyers for each case, who have adequate training and a depth of experience in defending capital cases. The American Bar Association has adopted Guidelines requiring that:

1. The defense team should consist of no fewer than two attorneys, an investigator and a mitigation specialist.<sup>4</sup>
2. The attorneys must be highly-qualified to defend a capital case by experience and training.
3. The attorneys must have demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases.
4. Defense Counsel have an obligation to conduct thorough and independent investigations relating both to the issues of guilt and penalty. These investigation must be conducted regardless of any statement or admission

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<sup>4</sup> In *State v. Kevin Johns*, by way of example, the Maryland Office of the Public Defender approved for payment at reduced rates, but still at considerable expense, the following experts: at least two full-time lawyers at all times; paralegal services; a private investigator; a PhD. Social worker acting as a mitigation specialist; a consulting Behavioral Neurologist; three Forensic Psychiatrists for consultation and testimony; a testing Psychologist; a Neuropsychologist; a PhD. Criminal Justice Professor; and former Bureau of Prisons Warden.

by the client, and regardless of the clients wishes. This means that defense counsel is required to discover, at a minimum, all reasonably available information and records<sup>5</sup> regarding the client's:

- A. Medical history;
  - B. Educational history;
  - C. Employment history;
  - D. Training;
  - E. Family history;
  - F. Social history;
  - G. Prior juvenile justice experience;
  - H. Adult correctional experience;
  - I. Religious influences and history; and,
  - J. Cultural influences.
5. Defense counsel must consider, thoroughly investigate the basis for, evaluate, and assert all legal claims potentially available.
6. After all of the investigation is done, trial counsel must explore every possible disposition short of death and, absent reaching such a disposition,

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<sup>5</sup> The records that must be located and reviewed pertain not only to the client, but also his or her siblings, parents, and other family members, and include but are not limited to: school records; social services and welfare records; juvenile dependency or family court records; medical records; military records; employment records; criminal and correctional records; family birth, marriage, and death records; alcohol and drug abuse assessment and treatment records; and INS records. *See, ABA Guideline 10.7, pg. 84, Commentary.*

must formulate a theory of defense that will be effective in connection with both guilt/innocence and penalty, and must minimize any inconsistencies.

7. Defense counsel must be familiar with all precedents relating to questioning and potentially challenging potential jurors, including the procedures surrounding “death qualification” concerning any potential juror’s beliefs about the death penalty.
8. The defense case concerning penalty must be thoroughly investigated and discussed with the client, including strategy, potential witnesses, experts, exhibits, information regarding potential alternatives to the death sentence, and demonstrative evidence, to include photos, videos and physical objects that may humanize the client or portray him positively.

The *ABA Guidelines* consist of 103 pages, with more than 350 footnotes, setting forth detailed requirements for the appointment and performance of counsel in death penalty cases, only some of which are outlined in the paragraphs above. The lawyers who have done capital defense work in Maryland are, for the most part, dedicated and competent counsel, but even with well-qualified counsel we must recognize that a system run by human beings will never be perfect. The requirements put on defense counsel by the *ABA Guidelines*, and endorsed by the Supreme Court in *Wiggins* as “guides to determining what is reasonable” demand near perfection. Near perfection should be

required of a system that permits government to take a human life, but perfection is not often achievable by any human, no matter how dedicated and qualified. As Deborah Fleischaker's testimony points out, a study of Maryland capital cases identified serious Constitutional errors in 77% of the cases reviewed. This is what happens when an appropriately high standard is applied to dedicated lawyers doing extremely difficult work — there will always be an error rate. Some errors are caught at the appellate level and the cases are sent back for re-trial or re-sentencing, but there will always be errors that are not caught. A notable example of unacceptable error in Maryland's system of capital litigation is in the case of Kirk Bloodsworth, a man who we all know of who paid an unconscionable penalty, and almost lost his life, for a crime he did not commit. A system that allows errors such as that is broken beyond repair.

One cannot know if our Maryland Legislature will ever find the political will to repeal or drastically modify the Maryland system of capital punishment. Such a system, as long as it exists is bound to be imperfect, almost guaranteeing that executions of innocents, if they have not already occurred, will occur. It is a system in which innocent people can be sentenced to death. It is also a system in which the selection process, the process by which defendants are chosen to be one of the few who will be forced to face the risk of death, has been shown to be geographically arbitrary. For example, as recently as 2002 Baltimore City had only one person on death row, but neighboring Baltimore County with one tenth as many murders as the City, had nine times the number of men on

death row. (L. Montgomery, *Md. Questioning Local Extremes on Death Penalty*, Wash. Post, May 12, 2002). There are legitimate questions regarding the influence of race in the calculus of death in Maryland's capital system. Maryland's Capital Punishment system is expensive, yet the defense function is so underfunded that highly-qualified private trial attorneys who accept appointment in a Maryland capital case must work at an hourly rate that is among the lowest offered by any state in the country.

It is my personal hope that at the end of this study period, this commission will recognize that perhaps it is time that Maryland followed the trend in civilized societies away from the death penalty. The State of New Jersey has examined the death penalty and as a result has recently repealed the death penalty, as has every Western Democracy and industrialized nation except the United States and Japan. In Maryland the Division of Correction now has state-of-the-art facilities at North Branch and the Maryland Correctional Adjustment Center that are well-suited for holding even our most dangerous prisoners in a safe and secure setting. Life without possibility of parole is severe punishment and an adequate substitute for the death penalty that serves justice, and protects the citizens of Maryland.